16-147

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~303.~~ 463

WILLIAM HENRY JESSUP, JABEZ HOWES, R. H. ELAM, AND E. K. HOWES, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR TH DISTRICT OF CALIFORNIA.

FILED OCTOBER 8, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 303.

WILLIAM HENRY JESSUP, JABEZ HOWES, R. H. ELAM, AND E. K. HOWES, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Summons	1	1
Complaint	6	2
Answer	23	6
Amended answer	25	6
Findings	34	9
Judgment	37	9
Bill of exceptions	42	11
Bond	59	17
Clerk's certificate	65	19
Writ of error	66	19
Citation	68	20

1 *Summons.*

UNITED STATES OF AMERICA.

In the circuit court of the United States of the ninth circuit, in and for the district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM HENRY JESSUP ET AL., DEFENDANTS.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city of San Francisco.

The President of the United States of America, greeting, to William Henry Jessup, Jabez Howes, Robert Henry Elam, and Edward Kallerain Howes, defendants:

You are hereby required to appear in an action brought against
2 you by the above-named plaintiff in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons) in the office of the clerk of said court in the city and county of San Francisco, within ten days after the service on you of this summons if served in this county, or if served out of this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to obtain a judgment against you for the sum of eight thousand dollars, with lawful interest from the 1st day of February, A. D. 1874, for an alleged breach of a certain bond more fully set out in said complaint, and for costs of this action, and if you fail to appear and plead, answer, or demur as herein required,
3 judgment by default will be entered against you and each of you for the sum of eight thousand dollars, with lawful interest from the 1st day of February, A. D. 1874, & for costs of this action.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 13th day of April, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the 101st.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:)

OFFICE U. S. MARSHAL,
Dist. of California.

I hereby certify that I received the within summons on the 30th day of April, 1876, and on the same day, at the city & county of San Francisco, in this district, I personally served the same on Jabez
4 Howes and E. K. Howes, two of the defendants named herein, by delivering to and leaving with each of them, personally, an attested copy of this summons, together with a certified copy of the complaint thereto attached.

E. P. MARSELLUS,
U. S. Marshal,
By B. J. AKERMAN, *Deputy.*

I further certify that Rob't H. Elam, one of the defendants, is not now a resident of this district, and that after diligent search I am unable to find him therein.

E. P. MARSELLUS,
U. S. Marshal.
By B. AKERMAN, *Deputy.*

I further certify that on the 30th day of May, 1877, at the county of Alameda in this district, I personally served this summons on W. H. Jessup, one of the defendants named herein, by delivering to
5 and leaving with him personally a true copy of this summons, together with a certified copy of the complaint.

E. P. MARSELLUS,
U. S. Marshal,
By C. H. PETERSON, *Deputy.*

SAN FRANCISCO, *June 1st*, 1877.

Filed June 2d, 1877. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

6 *Complaint.*

United States circuit court, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
WILLIAM HENRY JESSUP, JABEZ HOWES, Robert Henry Elam, and Edward Kallerain Howes.

The United States of America, plaintiff in this suit, by John M. Coghlan, esq., its attorney, complains of William Henry Jessup, Jabez Howes, Robert Henry Elam, and Edward Kallerain Howes, defendants in this suit, of a plea that the said defendants render unto the said plaintiff the sum of eight thousand dollars lawful money of the United States which the said defendants to the said plaintiff owe and unjustly detain.

7 For that, whereas, under the provisions of the 161st section of an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, the Commissioner of Internal Revenue was authorized from time to time to furnish, supply, and deliver to any manufacturer of friction or other matches, cigar lights, or wax tapers a suitable quantity of adhesive or other stamps such as might be prescribed for use in such cases without prepayment therefor, on a credit not exceeding sixty days, requiring in advance such security as the said Commissioner might judge necessary to secure payment therefor to the Treasury of the United States within the time prescribed for such payment:

That heretofore, to wit, on the 3d day of November, A. D.
8 1869, at the city and county of San Francisco, district of California, the said defendant, William Henry Jessup, was a manufacturer of friction and other matches, cigar lights, and wax tapers.

That for the purpose of securing payment of moneys received by the said William Henry Jessup for such adhesive stamps as had been and might thereafter be delivered to him without prepayment therefor, on

a credit not exceeding sixty days, and also of all quantities or amounts thereof which might remain undisposed of in his possession, it became and was necessary for the said defendant, William Henry Jessup, to execute a bond to the United States in accordance with law and the rules and regulations of the Treasury Department made in pursuance of law.

That heretofore, to wit, on the said 3d day of November, A. D. 1869, at the city and county of San Francisco, district of California,
9 the said William Henry Jessup, as principal, and the said Jabez Howes, Robert Henry Elam, and Edward Kallerain Howes, as sureties, by their certain writing obligatory, duly signed by them and sealed with their seals, a true and correct copy whereof, duly authenticated with the seal of the Treasury Department of the United States sealed thereto, and the signature of John Sherman, Secretary of the Treasury, signed thereto (the said original bond being now on file in said Treasury Department), is now shown the court, have acknowledged themselves to be held and firmly bound jointly and severally unto the said United States in the just and full sum of ten thousand dollars, to be paid to the said plaintiff subject to certain conditions therein written.

That by the terms of the said bond or writing obligatory it was conditioned, among other *this* things, that whereas ad-
10 hesive stamps had been delivered or thereafter might be delivered to said William Henry Jessup, therefore if the said William Henry Jessup should make a faithful return, whenever so required, of the moneys received by him for such adhesive stamps as had been or might thereafter be delivered to him, and of all quantities or amounts thereof undisposed of, whenever required so to do, and should do and perform all other acts of him required to be done in the premises, according to law and regulations, and should well and truly pay, or cause to be paid, to the Treasurer of the United States, for the use of the United States, all and every such sum or sums of money as he, the said William Henry Jessup, might owe to the United States for adhesive stamps which had been or should be delivered to him, or
11 which had been or should be forwarded to him according to his request or order, within the time prescribed for payment for the same according to law, and should and would pay or cause to be paid to the said Treasurer for the use aforesaid, each and every such sum of money as should become due or payable to the United States, at the time and on the days each sum should respectively become due or payable, then the above obligation to be void and of no effect, otherwise to remain in full force and virtue, as by a copy of the said writing obligatory hereto attached, marked Exhibit A and made part of this declaration, will more fully appear.

And said plaintiff alleges that the said defendant William Henry Jessup was a manufacturer of friction and other matches, cigar lights, and wax tapers at said city and county of San Francisco, district
12 of California, from and including the 3d day of November, A. D. 1869, to and including the first day of February, A. D. 1874.

And the said plaintiff further avers that the said defendant William Henry Jessup did not well and truly make a faithful return, when so required, of the moneys received by him for such adhesive stamps as were delivered to him, and of all quantities or amounts thereof undisposed of, when required so to do, and did not do and perform all such acts as were required of him to be done in the premises, according to law and the regulations, and did not well and truly pay or cause to be

paid to the Treasurer of the United States, for the use of the United States, all and every such sum or sums of money as he, the said William Henry Jessup, owed to the United States for adhesive stamps which were delivered to him, and which were forwarded to him
13 according to his request or order, within the time prescribed for payment for the same according to law, and did not pay or cause to be paid to the said Treasurer, for the use aforesaid, each and all such sums of money as become due or payable to the United States at the time and on the days each sum respectively became due or payable.

And the said plaintiff assigns as a breach of the condition of the said writing obligatory, that the said William Henry Jessup, while he was manufacturer of friction and other matches, cigar lights, and wax tapers, during the time aforesaid, did not well and truly make a faithful return, when so required, of the moneys received by him for such adhesive stamps as were delivered to him, and of all quantities or amounts thereof undisposed of, when required so to do, and did
14 not do and perform all such acts as were required of him to be done in the premises, according to law and regulations, and did not well and truly pay, or cause to be paid, to the Treasurer of the United States, for the use of the United States, all and every such sum or sums of money as he the said William Henry Jessup owed to the United States for adhesive stamps which were delivered to him, and which were forwarded to him according to his request or order, within the time prescribed for payment for the same according to law, and did not pay or cause to be paid to the said Treasurer, for the use aforesaid, each and all such sums of money as became due or payable to the United States at the time and on the days each sum respectively became due or payable. That the sum received for adhesive stamps and not accounted for as aforesaid amounted to the sum of eight thousand
15 dollars, and that the said William Henry Jessup, as aforesaid, did not nor has he at any time paid said sum or any part thereof.

That the accounts of the said William Henry Jessup, under his said bond or writing obligatory, have been adjusted at the office of the assistant treasurer of the United States, San Francisco, California, whereby the said sum of eight thousand dollars has been ascertained and reported to be due to the United States from said William Henry Jessup.

By means of which said breach of said writing obligatory, as hereinbefore assigned and set forth, an action hath accrued to the said plaintiff to have and demand of and from said defendants jointly and severally the said sum of eight thousand dollars.

That on the first day of February, A. D. 1874, the said United States, plaintiff in this action, demanded of the said defendants payment
16 of the said sum of eight thousand dollars, but that the said defendants refused to pay, and have not as yet paid, the said sum or any part thereof.

And therefore the said plaintiff became and is entitled to, and so demands, judgment against the said defendants, upon the said bond or writing obligatory, for the said sum of eight thousand dollars.

Wherefore plaintiff brings suit and prays judgment against said defendants for said sum of eight thousand dollars, with lawful interest from the first day of February, A. D. 1874, and costs of suit.

J. M. COGHLAN,
United States Attorney.

17 UNITED STATES (vignette) OF AMERICA.

D. B. M. TREASURY DEPARTMENT,
March 17th, 1877.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of the original bond of William H. Jessup, match manufacturer, and late stamp-agent at San Francisco, Cal., dated November 3d, 1869, on file in this department.

In witness whereof I have hereunto set my hand and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[SEAL.]
C. T. H. K.

JOHN SHERMAN,
Secretary of the Treasury.

18 UNITED STATES INTERNAL REVENUE.

Know all men by these presents, that I, William Henry Jessup, of the city & county of San Francisco, California, as principal, and Jabez Howes, Robert Henry Elam, and Edward Kallerain Howes, of the same city & county, as sureties, are held and firmly bound unto the United States of America in the full and just sum of ten thousand $\frac{00}{100}$ ($10,000) dollars, money of the United States, to which payment well and truly to be made we bind ourselves jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this third day of November, in the year one thousand eight hundred and sixty-nine.

The condition of the foregoing obligation is such that whereas
19 the said William Henry Jessup is a manufacturer of friction or other matches, cigar-lights, or wax tapers; and whereas under the provisions of the 161st section of an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, the Commissioner of Internal Revenue is authorized from time to time, to furnish, supply, and deliver to any manufacturer of friction or other matches, cigar-lights, or wax tapers, a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without prepayment therefor, on a credit not exceeding sixty days, requiring in advance such security as he may judge necessary to secure payment therefor to the Treasury of the United States within the time prescribed for such payment; and whereas adhesive stamps have been delivered, or
20 hereafter may be delivered, to said William Henry Jessup by virtue of said authority: Now, therefore, if the said William Henry Jessup shall make a faithful return whenever so required of the moneys received by him for such adhesive stamps as have been or may hereafter be delivered to him, and of all quantities or amounts thereof undisposed of, whenever required so to do, and shall do and perform all other acts of him required to be done in the premises according to law and regulations, shall well and truly pay or cause to be paid to the Treasurer of the United States for the use of the United States all and every such sum or sums of money as the said William Henry Jessup may owe to the United States for adhesive stamps which have been or shall be delivered to him, or which have been or shall be forwarded to him according to his request or order, within the time prescribed
21 for payment for the same according to law, and shall and will pay or cause to be paid to the said Treasurer for the use aforesaid each and every such sum of money as shall become due or payable to

the United States, at the time and on the days each sum shall respectively become due or payable, then the above obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

WILLIAM HENRY JESSUP. [SEAL.]
JABEZ HOWES. [SEAL.]
ROBERT HENRY ELAM. [SEAL.]
EDWARD KALLERAIN HOWES. [SEAL.]

Sealed and delivered in the presence of us—
E. V. JOICE,
RICHARD B. NOYES.

[Int. rev. stamp, 25 cents.]

UNITED STATES ATTORNEY'S OFFICE,
DISTRICT OF CALIFORNIA,
San Francisco, November 3d, 1869.

I hereby certify that the sureties to the within bond are sufficient to pay the penalty thereof.

FRANK M. PIXLEY,
U. S. Attorney.

[Int. rev. stamp, 5 cents.]

22 (Endorsed:) Filed 13 April, 1877. L. S. B. Sawyer, clerk.

23 *Answer.*

United States circuit court, ninth circuit, district of California.

THE UNITED STATES
vs.
WILLIAM HENRY JESSUP, JABEZ HOWES, Robert Henry Elam, and Edward K. Howes. } Answer.

Now come the defendants in the above-entitled action, and answering the complaint of the plaintiff herein deny each, every, all, and singular the allegations, matters, and things therein contained.

Wherefore defendants pray to be hence dismissed with costs.

LATIMER, MORROW AND PROFFATT,
Attorneys for Defendant.

24 (Endorsed:) Service of copy admitted this 2d day of June, 1877.

JNO. M. COGHLAN,
U. S. Attorney.

Filed 2d June, 1877. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

25 *Amended answer.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES
vs.
WILLIAM HENRY JESSUP, JABEZ HOWES, Robert Henry Elam, and Edward Kallerain Howes.

Now come the defendants, and by leave of the court first had and ob-

tained file this their amended answer to the complaint of plaintiffs herein:

They deny each and every, all and singular, the allegations, matters, and things in said complaint contained, except the matters and things hereinafter expressly admitted.

They admit the execution and delivery of the bond mentioned in the complaint, but deny that the said defendant William Henry
26 Jessup did not well and truly make a faithful return, when so required, of the moneys received by him for such adhesive stamps as were delivered to him, and of all quantities or amounts thereof undisposed of, when required so to do; deny that he did not do and perform all such acts as were required of him to be done in the premises according to law and the regulations, and deny that he did not well and truly pay, or cause to be paid, to the Treasurer of the United States, for the use of the United States, all and every such sum or sums of money as he, the said William Henry Jessup, owed to the United States for adhesive stamps which were delivered to him, or which were forwarded to him according to his request or order, within the time prescribed for payment for the same according to law, and deny that he did not pay, or cause to be paid, to the said Treasurer, for the use aforesaid, each and all such sums of money as became
27 due or payable to the United States at the time and on the days each sum respectively became due or payable.

Defendants further deny that the said William Henry Jessup, while he was a manufacturer of friction matches or other matches, cigar lights, or wax tapers, or otherwise, or during the time mentioned in the complaint, did not well and truly make a faithful return when so required of the moneys received by him for such adhesive stamps as were delivered to him, and of all quantities or amounts thereof undisposed of, when required so to do; deny that he did not do and perform all such acts as were required of him to be done in the premises according to law and regulations; deny that he did not well and truly pay or cause to be paid to the Treasurer of the United States, for the use of the United States, all and every such sum or sums of money as he, the said Willian Henry Jessup, owed to the United States for ad-
28 hesive stamps which were delivered to him, or which were forwarded to him according to his request or order, within the time prescribed for payment for the same according to law, and deny that he did not pay or cause to be paid to the said Treasurer, for the use aforesaid, each and all such sums of money as became due or payable to the United States at the time and on the days each sum respectively became due and payable. Defendants deny that the sum received for adhesive stamps and not accounted for amounted to the sum of eight thousand dollars, or any other sum or sums of money. Defendants deny that the accounts of the said William Henry Jessup under his said bond or writing obligatory have been adjusted at the assistant treasurer's of the United States, San Francisco, California, and deny that the accounts of the said William Henry Jessup
29 have been adjusted by proper authority, or at all, and deny that the sum of eight thousand dollars or any other sum has been ascertained to be due the United States from said William Henry Jessup. Defendants deny that an action has accrued to the plaintiff to have and demand of and from the defendants, jointly and severally or otherwise, the said sum of eight thousand dollars, or any other sum or sums of money.

Further answering, the defendants aver that the said William Henry

Jessup well and truly performed, fulfilled, and complied with all the conditions in said bond or writing obligatory; that he made faithful return whenever required of the moneys received by him for all adhesive stamps delivered to him, and of all quantities and amounts undisposed of, and did and performed all other acts of him required to be done in the premises according to law and regulations, and well
30 and truly paid to the Treasurer of the United States, for the use of the United States, all and every such sum or sums of money as he, the said William Henry Jessup, owed to the United States for adhesive stamps delivered or forwarded to him, according to his request or order, within the time prescribed for payment for the same according to law, and paid to the said Treasurer, for the use aforesaid, each and every sum of money that became due to the United States, at the time the same became due and payable.

And for a further answer and defense defendants aver that the liability for which said bond was given was before the commencement of this action fully paid, satisfied, and discharged; that the said Jessup has fully paid and accounted to the Treasurer of the United States, and within the time prescribed for such payment and accounting, for the value of all stamps furnished, supplied, and delivered to the
31 said Jessup by the Commissioner of Internal Revenue on the security of said bond.

And for a further and separate answer and defense to said action, defendants aver that under the law and regulations, and the conditions of the bond mentioned in the complaint, all stamps of whatsoever kind or denomination delivered to Jessup were to be so delivered to him upon a credit not exceeding sixty days; that after the delivery and execution of said bond, and before the pretended liability mentioned in said complaint had accrued, to wit, on the 18th day of April, A. D. 1870, the said United States, or some of its officers, made a new contract with the said Jessup, without the knowledge or consent of the defendants Jabez Howes, Robert Henry Elam, and Edward Kallerain Howes (the sureties on said bond), or either of them, whereby
32 the said Jessup was credited on the books of the assistant treasurer of the United States at San Francisco, California, with the sum of eight thousand dollars on account of said bond, and the credits for stamps furnished, supplied, and delivered to said Jessup were by the same authority, and without the knowledge or consent of the aforesaid defendants, extended indefinitely and beyond said term of sixty days.

Defendants further aver that if the said Jessup has become indebted to the United States for stamps furnished, supplied, or delivered to him, such indebtedness has accrued since the making of and under said new contract, and not otherwise.

Wherefore defendants pray to be hence dismissed with their costs.

LATIMER, MORROW & PROFFATT,
Attorneys for Defendants.

33 (Endorsed:)

Service of copy admitted this 14 day of Aug., 1877.

A. P. VAN DUZER,
Ass't U. S. Attorney.

Filed 14 August, 1877. L. S. B. Sawyer, clerk.

34 *Findings.*

In the circuit court of the United States of the ninth judicial circuit, in and for the district of California.

THE UNITED STATES OF AMERICA
v.
WILLIAM HENRY JESSUP ET AL. } No. 1756.

This cause came on to be tried before the court sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel duly filed with the clerk of this court, Philip Teare, esquire, U. S. attorney, and A. P. Van Duzer, esquire, assistant U. S. attorney, appearing on behalf of plaintiff, and Messrs. Latimer, Morrow and Proffatt on behalf of defendants, and the evidence taken herein and the arguments of counsel having been heard, and the cause
35 having, on the third day of September, A. D. 1878, being a day in the July term, A. D. 1878, of said court, been submitted to the court for consideration and decision, and the court being fully advised in the premises, now finds the issues of fact in favor of the United States of America, plaintiff herein, and that plaintiff is entitled to judgment for the sum of seven thousand two hundred seventy-two $\frac{72}{100}$ dollars principal, together with the sum of fourteen hundred eighteen $\frac{18}{100}$ dollars interest, being interest upon said principal sum from March 1st, 1876, to date; in all, principal and interest, aggregating the sum of eight thousand six hundred ninety $\frac{90}{100}$ dollars.

It is therefore ordered that judgment be entered herein in favor of plaintiff and against the defendants, William Henry Jessup, Jabez
36 Howes, Robert Henry Elam, and Edward Kallerain Howes, for the sum of seven thousand two hundred seventy-two $\frac{73}{100}$ dollars, together with interest thereon at the rate of six per cent. per annum from the first day of March, A. D. 1876, amounting to the sum of fourteen hundred eighteen $\frac{18}{100}$ dollars; in all, principal and interest, aggregating the sum of eight thousand six hundred ninety $\frac{91}{100}$ dollars, and also costs of action.

June 2d, 1879.

(Signed) LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

(Endorsed:) Filed June 2d, 1879. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

37 *Judgment.*

In the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California.

THE UNITED STATES OF AMERICA
vs.
WILLIAM HENRY JESSUP ET AL. } No. 1756.

This cause having come on regularly for trial on the 27th day of March, 1878, being a day in the February, 1878, term of said court, before the court sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel for the respective parties hereto duly filed with the clerk of said court, Philip Teare,

esq., U. S. attorney, and A. P. Van Duzer, esq., assistant U. S. attorney, appearing on behalf of the United States, and L. D. Latimer and W. W. Morrow, esq's, on behalf of the defendants, and
38 the trial having been proceeded with on the 8th, 15th, 22d, and 29th days of April, and on the 3d day of September, 1878, and witnesses on behalf of the plaintiff and of the defendants having been sworn and examined, and the evidence being closed, the cause, after arguments of counsel having been submitted to the court, and the court, after due deliberation, having filed its finding in writing, and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and the finding aforesaid, it is considered by the court that the United States of America, plaintiff, do have and recover of and from William Henry Jessup, Jabez Howes, Robert Henry Elam, and Edward Kallerain Howes the sum of seven thousand two hundred seventy-two $\frac{73}{100}$ dollars, together with interest thereon at the rate of six per cent. per annum from the first day
39 of March, 1876, amounting to the sum of fourteen hundred eighteen $\frac{18}{100}$ dollars; in all, principal and interest, aggregating the sum of eight thousand six hundred ninety $\frac{91}{100}$ dollars, and its costs in this behalf expended, taxed at seventy-four $\frac{80}{100}$ dollars.

Judgment entered the 2d day of June, 1879.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 2d day of June, A. D. 1879.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed June 2d, 1879. L. S. B. Sawyer, clerk.

40 *Certificate to judgment-roll.*

In the circuit court of the United States, ninth judicial circuit, district of California.

THE UNITED STATES OF AMERICA }
vs. }
WILLIAM HENRY JESSUP ET AL. }

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the therein-entitled action.

Witness my hand and the seal of said circuit court this 2d day of June, A. D. 1879.

[SEAL.]

L. S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE,
Deputy Clerk.

41 (Endorsed:) Judgment-roll. Filed 2d June, 1879. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

42 *Bill of exceptions.*

United States circuit court, ninth circuit, district of California.

THE UNITED STATES
v.
WILLIAM HENRY JESSUP, JABEZ HOWES, Rob't Henry Elam, and Edward K. Howes. } Bill of exceptions.

This cause came on regularly to be heard before said court on the 3rd day of September, 1878, A. P. Van Duzer, esq'r., assistant U. S. attorney, appearing for the plaintiff, and W. W. Morrow appearing for the defendants. A jury was waived by the said parties, and the action was tried before the court without a jury.

43 Counsel for defendants moved to dismiss the action on the ground that the bond set forth in the complaint, and on which the action is brought, is given to the United States, and not to the Treasurer of the United States, as provided in section 161 of the act of June 30th, 1864, as amended.

The court denied the motion to dismiss the action to which ruling of the court counsel for the defendants then and there duly excepted.

Counsel for defendants thereupon moved to dismiss the action on the ground that this suit is brought by and in the name of the United States as plaintiff, instead of, by, and in the name of the Treasurer of the United States as plaintiff, as required by section 161 of the act of June 30th, 1864, as amended.

The court denied the motion to dismiss the action, to which
44 ruling of the court counsel for the defendants then and there duly excepted.

Counsel for plaintiff then offered in evidence the bond, a copy of which is attached to the complaint. The defendants objected to the introduction of the bond in evidence on the ground that it was not in the form required by the statute of the United States; that it appeared on its face to have been given to the United States, whereas the deficiency or balance sought to be recovered in this action can only be recovered on a bond given to the Treasurer of the United States. The court overruled the objection, and admitted the bond in evidence, to which ruling the counsel for defendants then and there duly excepted.

To show that the defendants were indebted to the plaintiff, counsel for plaintiff offered in evidence the books of accounts from the office of the assistant treasurer of the United States at San Francisco,
45 showing the account of W. H. Jessup with the assistant treasurer of the United States for stamps purchased on a credit. Defendants objected to said account on the ground that it was incompetent and irrelevant to prove any deficiency for which the defendants Jabez Howes, Robert Henry Elam, and Edward K. Howes, sureties on the bond in suit, were liable, for the reason that it appeared on the face of said account that the credits were continuously for a greater period than sixty days, and therefore said account was not within the statute, and incompetent, and the evidence irrelevant to the issues in this action. There was no evidence that there was at any time any agreement or promise to give a credit of more than sixty days for any stamps delivered, or of anything to prevent the government from at any time properly bringing an action to recover the value of any stamps
46 delivered at the expiration of sixty days after delivery.

The court overruled the objections, and admitted the account

in evidence, to which ruling the counsel for the defendants then and there duly excepted. Said account is as follows, to wit:

47 WM. H. JESSUP.

1869.				
Dec.	18.	Stamps delivered		3,000
1870.				
Jan'y	15.	"	"	1,000
Feb.	5.	"	"	1,000
	12.	"	"	2,000
	19.	"	"	1,000
	"	"	"	100
M'ch	5.	"	"	2,050
	12.	"	"	1,000
	26.	"	"	1,050
	31.	"	"	1,500
Ap'r	16.	"	"	50
	18.	"	"	8,100
May	7.	"	"	25
	31.	"	"	1,000
	31.	"	"	50
June	18.	"	"	1,050
July	16.	"	"	1,050
Aug't	6.	"	"	1,050
	13.	"	"	1,050
	27.	"	"	1,050
Sept.	2.	"	"	1,050
	17.	"	"	1,050
	24.	"	"	1,050
Oct.	8.	"	"	1,050
	15.	"	"	1,050
	22.	"	"	1,050
Nov.	5.	"	"	1,050
	12.	"	"	1,050
	25.	"	"	1,050
		Amount forward		37,625

1869.			
Dec.	18.	Cash	3,000
1870.			
Jan'y	15.	"	1,000
Feb.	5.		1,000
	12.		2,000
	19.		1,000
	"	Commissions on $2,000	100
April	16.	Cash	1,000
	"	Commissions on $1,000	50
	18.	Cash	4,000
	"	Commissions	200
May	3.	"	25
	7.	Cash	500
	30.	"	1,000
	30.	Commissions	50
June	18.	Cash	1,000
	30.	Commissions	50
July	16.	Cash	1,000
	30.	Commissions	50
Aug't	6.	Cash	1,000
	"	Commissions	50
	13.	Cash	1,000
	"	Commissions	50
	27.	Cash	1,000
	"	Commissions	50
Sept.	2.	Cash	1,000
	"	Commissions	50
	19.	Cash	1,000
	"	Commissions	50
	24.	Cash	1,000
	"	Commissions	50
Oct.	8.	Cash	1,000
	"	Commissions	50
	15.	Cash	1,000
	"	Commissions	50
	22.	Cash	1,000
	"	Commissions	50
Nov.	5.	Cash	1,000
	"	Commissions	50
	12.	Cash	1,000
	"	Commissions	50
	25.	Cash	1,000
	"	Commissions	50
		Amount forward	29,625

48 WM. H. JESSUP.

1870.				
Dec.		Amount forward		37,625
	15.	Stamps delivered		1,050
1871.				
Jan'y	14.	"	"	1,050
Feb.	11.	"	"	2,100
M'ch	18.	"	"	1,050
	25.	"	"	1,050
	30.	"	"	1,050
April	22.	"	"	1,050
May	20.	"	"	1,050
	27.	"	"	1,050
June	10.	"	"	1,050
	24.	"	"	1,050
July	15.	"	"	2,100
	29.	"	"	1,050
Aug't	5.	"	"	2,100
	19.	"	"	1,050
Sept.	16.	"	"	2,100
Oct.	7.	"	"	2,100
	14.	"	"	1,050

1870.			
Dec.		Am't forward	29,625
	15.	Cash	1,000
	"	Commissions	50
1870.			
Jan'y	14.	Cash	1,000
	"	Commissions	50
Feb.	6.	Cash	1,000
	11.	Cash	1,000
	"	Commissions	100
M'ch	14.	Cash	1,000
	"	Commissions	50
	25.	Cash	1,000
	"	Commissions	50
	29.	Cash	1,000
	"	Commissions	50
April	20.	Cash	1,000
	"	Commissions	50
May	18.	Cash	1,000
	20.	Commissions	50
	25.	Cash	1,000
	27.	Commissions	50
June	7.	Cash	1,000
	10.	Commissions	50
	20.	Cash	1,000
	24.	Commissions	50
July	10.	Cash	1,000
	13.	Cash	1,000
	15.	Commissions	100
	25.	Cash	1,000

WM. H. JESSUP—Continued.

		Am't forward	61,775
	29.	Commissions	50
Aug't	1.	Cash	1,000
	2.	Cash	1,000
	5.	Commissions	100
	15.	Cash	1,000
	19.	Commissions	50
Sept.	10.	Cash	1,000
	15.	Cash	1,000
	26.	Commissions	100
Oct.	4.	Cash	1,000
	7.	Cash	1,000
	"	Commissions	100
	12.	Cash	1,000
	14.	Commissions	50
		Am't forward	53,775

49 WM. H. JESSUP.

1871.			
Oct.		Am't forward	61,775
	21.	Stamps delivered	1,050
	28.	" "	1,050
Nov.	18.	" "	1,050
Dec.	9.	" "	1,050
	30.	" "	1,050
1872.			
Jan'y	6.	" "	1,050
	20.	" "	1,050
	27.	" "	1,050
Feb.	10.	" "	1,050
	17.	" "	1,050
	29.	" "	1,050
M'ch	16.	" "	1,050
	23.	" "	1,050
April	6.	" "	1,050
	13.	" "	1,050
	26.	" "	1,050
	27.	" "	1,050
May	4.	" "	1,050
	11.	" "	1,050
	18.	" "	1,050
	25.	" "	1,050
		Amount forward	83,825

1871.			
Oct.		Am't forward	53,775
	16.	Cash	1,000
	21.	Commissions	50
	25.	Cash	1,000
	28.	Commissions	50
Nov.	18.	Cash	1,000
	"	Commissions	50
Dec.	4.	Cash	1,000
	9.	Commissions	50
	30.	Cash	1,000
	"	Commissions	50
1872.			
Jan'ry	3.	Cash	1,000
	6.	Commissions	50
	16.	Cash	1,000
	20.	Commissions	50
	24.	Cash	1,000
	27.	Commissions	50
Feb.	7.	Cash	1,000
	10.	Commissions	50
	17.	Cash	1,000
	"	Commissions	50
	26.	Cash	1,000
	29.	Commissions	50
M'ch	11.	Cash	1,000
	16.	Commissions	50
	19.	Cash	1,000
	23.	Commissions	50
April	1.	Cash	1,000
	6.	Commissions	50
	10.	Cash	1,000
	13.	Commissions	50
	18.	Cash	1,000
	20.	Commissions	50
	24.	Cash	1,000
	29.	Commissions	50
May	1.	Cash	1,000
	4.	Commissions	50
	11.	Cash	1,000
	"	Commissions	50
	17.	Cash	1,000
	18.	Commissions	50
	25.	Cash	1,000
	"	Commissions	50
		Amount forward	75,825

50 WM. H. JESSUP.

1872.			
May		Am't forward	83,825
	30.	Stamps delivered	1,050
June	8.	" "	1,050
	22.	" "	1,050
July	6.	" "	1,050
	13.	" "	1,050
	27.	" "	1,050
	31.	" "	1,050
Aug't	17.	" "	1,050
Sept.	7.	" "	1,050
	20.	" "	1,050
Oct.	5.	" "	1,050
	12.	" "	1,050
	31.	" "	1,050

1872.			
May		Am't forward	75,825
	29.	Cash	1,000
	30.	Commissions	50
June	5.	Cash	1,000
	8.	Commissions	50
	20.	Cash	1,000
	22.	Commissions	50
July	3.	Cash	1,000
	6.	Commissions	50
	13.	Cash	1,000
	"	Commissions	50
	25.	Cash	1,000
	27.	Commissions	50
	31.	Cash	1,000

WM. H. JESSUP—Continued.

Nov.	16.	" "	1,050
	30.	" "	1,050
Dec.	14.	" "	1,050
	28.	" "	1,050
1872.			
Jan'ry	18.	" "	1,050
Feb.	28.	" "	1,050
M'ch	22.	" "	2,000
		Am't forward	105,875

		" Commissions	50
Aug't	14.	Cash	1,000
	17.	Commissions	50
Sept.	1.	Cash	1,000
	10.	Commissions	50
	17.	Cash	1,000
	21.	Commissions	50
Oct.	2.	Cash	1,000
	5.	Commissions	50
	11.	Cash	1,000
	12.	Commissions	50
	29.	Cash	1,000
	31.	Commissions	50
Nov.	16.	Cash	1,000
	"	Commissions	50
	26.	Cash	1,000
	30.	Commissions	50
Dec.	10.	Cash	1,000
	14.	Commissions	50
	23.	Cash	1,000
	28.	Commissions	50
1873.			
Jan	18.	Cash	1,000
	"	Commissions	50
Feb.	28.	Cash	1,000
	"	Commissions	50
M'ch	17.	Cash	1,000
	18.	Cash	1,000
	22.	Commissions	100
		Am't forward	97,875

51 WM. H. JESSUP.

1873.			
Mc'h		Am't forward	105,875
	29.	Stamps delivered	2,100
April	26.	" "	1,050
	30.	" "	1,050
May	17.	" "	1,050
	24.	" "	1,050
	30.	" "	1,050
July	31.	" "	2,100
Aug't	30.	" "	1,050
Sept.	30.	" "	1,050
Oct.	31.	" "	1,050
Nov.	19.	" "	8,400
Dec.	31.	" "	1,050
1874.			
Jan'ry	31.	" "	4,200
June	30.	" "	1,050
July	31.	" "	2,100
Aug't	31.	" "	1,050
Sept.	30.	" "	2,100
Oct.	31.	" "	2,100
		Am't forward	140,525

1873.			
M'ch		Am't forward	97,875
	24.	Cash	1,000
	29.	Cash	1,000
	29.	Commissions	100
April	24.	Cash	1,000
	26.	Commissions	50
	30.	Cash	1,000
	"	Commissions	50
May	17.	Cash	1,000
	"	Commissions	50
	21.	Cash	1,000
	24.	Commissions	50
	26.	Cash	1,000
	30.	Commissions	50
July	19.	Cash	1,000
	31.	Cash	1,000
	"	Commissions	100
Aug't	30.	Cash	1,000
	"	Commissions	50
Sept.	30.	Cash	1,000
	"	Commissions	50
Oct.	18.	Cash	1,000
	31.	Commissions	50
Nov.	17.	Cash	8,000
	"	Commissions	400
Dec.	27.	Cash	1,000
	31.	Commissions	50
1874.			
Jan'y	8.	Cash	1,000
	19.	Cash	3,000
	31.	Commissions	200
June	26.	Cash	1,000
	30.	Commissions	50
July	15.	Cash	1,000
	30.	Cash	1,000
	31.	Commissions	100
Aug't	25.	Cash	1,000
	31.	Commissions	50
Sept.	10.	Cash	1,000
	22.	Cash	1,000
	31.	Commissions	100
Oct.	7.	Cash	1,000
	15.	Cash	1,000
	31.	Commissions	100
		Am't forward	132,525

52 WM. H. JESSUP.

1874.			
Nov.		Am't forward	140,525
	30.	Stamps delivered	3,150
Dec.	30.	" "	2,205
1875.			
Jan'y	31.	" "	2,100
Feb.	28.	" "	2,100
M'ch	31.	" "	3,050
April	30.	" "	1,050
May	31.	" "	2,100
June	30.	" "	2,100
July	31.	" "	3,255
Aug't	31.	" "	3,255
Sept.	30.	" "	2,100
Oct.	30.	" "	3,150
		Am't forward	170,240

1874.			
Nov.		Am't forward	132,525
	3.	Cash	1,000
	17.	Cash	1,000
	27.	"	1,000
	30.	Commissions	150
Dec.	10.	Cash	1,100
	23.	"	1,000
	31.	Commissions	105
1875.			
July	14.	Cash	1,000
	35.	"	1,000
	31.	Commissions	100
Feb'y	5.	Cash	1,000
	19.	"	1,000
	28.	Commissions	100
M'ch	8.	Cash	1,000
	19.	"	1,000
	30.	"	1,000
	31.	Commissions	150
April	15.	Cash	1,000
	30.	Commissions	50
May	5.	Cash	1,000
	21.	"	1,000
	30.	Commissions	100
June	5.	Cash	1,000
	20.	"	1,000
	30.	Commissions	100
July	8.	Cash	1,100
	19.	"	1,000
	26.	"	1,000
	31.	Commissions	155
Aug't	9.	Cash	1,100
	19.	"	1,000
	30.	"	1,000
	31.	Commissions	155
Sept.	9.	Cash	1,000
	22.	"	1,000
	30.	Commissions	100
Oct.	5.	Cash	1,000
	15.	"	1,000
	25.	"	1,000
	30.	Commissions	150
		Am't forward	162,240

53 WM. H. JESSUP.

1875.			
Nov.		Am't forward	170,240
	30.	Stamps delivered	2,205
Dec.	31.	" "	2,290 50
			174,735 50
1876.			
Jan'y	1.	Balance	8,000 00

1875.			
Nov.		Am't forward	162,240
	8.	Cash	1,000
	24.	"	1,100
	30.	Commissions	105
Dec.	8.	Cash	1,100
	21.	"	1,081 43
	31.	Commissions	109 07
	31.	Balance due U. S.	8,000
			174,735 50

54 EDWARD ST. JOHN BELLOWS was called on behalf of the United States, and testified as follows:

I am the book-keeper in the office of the assistant treasurer of the United States at San Francisco. The credit of sixty days was given to the match manufacturers down to April 18th, 1870. We then brought down a standing credit of the amount they were allowed to draw on the bond, which in this case was a credit of $8,000.00. From April 18th, 1870, on, we required the match manufacturers simply to keep the amount of the bond good, and the practice was when the manufacturer drew any amount of stamps from the office he paid an equal amount on the oldest debt, without regard to the length of time the

debit had been running. On cross-examination, witness' attention was called to the fact and he admitted that the account shows that there were no transactions between Jessup and the assistant treasurer
55 between the January 31st, 1874, and June 30th, 1874; and that there was on the 31st day of January, 1874, due the assistant treasurer the balance of $8,000.00, and that no part of this indebtedness was paid until after June 30th, 1874, or more than 150 days; that none of the items of indebtedness after April 18th, 1870, were in fact paid in sixty days from the date the indebtedness was incurred. On redirect examination, witness testified that the account as it appears from the books ran from December 18th, 1869, to December 30, 1875. The last items of debit and credit are on the 31st day of December, 1875. From April 18th, 1870, when the standing credit was brought, down to December 31st, 1875, when the last item closed the account, the balance due the United States was always $8,000, less the commissions of ten per cent. provided by law. The balance now sued for is comprised in and is a part of the last items of the account as follows:

56	September 30th	$2,100
	October 30th	3,150
November 30th		2,205
December 31st		2,290 50
		$9,745 50

All the preceding items of debit have been paid, as the account shows.

WILLIAM SHERMAN was called on behalf of the United States, and testified as follows:

Have been assistant treasurer of the United States since June 1st, 1873. I have notified the defendant Jessup from time to time that the amount of the bond was due, and have called him for payment. The accounts were kept in accordance with the instructions from the department at Washington. On cross-examination, witness testified that the items of indebtedness ran for a longer period than sixty
57 days, but they kept the account at the same amount, making payments on the oldest indebtedness whenever stamps were drawn. Jessup had a die of his own and was therefore entitled to a commission of ten per centum.

Plaintiff here rested.

Defendants, to maintain the issues on their part, called the defendant W. H. Jessup, who testified that his sureties knew nothing of the change of the system of credits adopted by the assistant treasurer of the United States on the 18th day of April, 1880, and it was thereupon admitted that the sureties on the bond in suit knew nothing of any change in the matter of credits and debits.

This was the substance of the testimony offered in the case, and after argument by counsel the case was submitted to the court
58 and thereafter, to wit; on the 2d day of June, 1879, the court rendered judgment in favor of the plaintiff and against the defendants for the sum of $7,272.73, with interest from the first day of March, 1876, amounting to $1,418.18 and costs.

And forasmuch as the matters aforesaid do not appear in the record of the proceedings upon the trial, the counsel for the defendants have prepared this bill of exceptions, containing the substance of all the facts, matters proved, and evidence given pertinent or in any way relating to the exceptions taken, and have requested his honor the judge of this court to set his hand and seal thereto, which the said judge has done this 16th day of August, 1879.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed August 16th, 1879. L. S. B. Sawyer, clerk.

59 *Bond.*

In the Supreme Court of the United States of America.

WILLIAM HENRY JESSUP, JABEZ HOWES, Robert Henry Elam, and Edward Kallerain Howes, plaintiffs in error,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT in error.

Know all men by these presents that we, Millen Griffith, Daniel Taylor, Theodore H. Allen, and John H. Coombs, are held and firmly bound unto the United States of America, defendant in error, in the sum of twelve thousand dollars lawful money of the United States of America, to be paid to the said United States of America, to the
60 payment of which well and truly to be made we bind ourselves and each of us, and our and each of our heirs, executors, and administrators, firmly by these presents severally, as follows, to wit: The said Millen Griffith in the full sum of twelve thousand dollars, the said Daniel Taylor in the full sum of four thousand dollars, the said Theodore H. Allen in the full sum of four thousand dollars, and the said John H. Coombs in the full sum of four thousand dollars. Sealed with our seals, dated the eighteenth day of August, A. D. 1879.

Whereas the above-named William Henry Jessup, Jabez Howes, Robert Henry Elam, and Edward Kallerain Howes have prosecuted a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered by the circuit court of the United States of America for the district of California in the cause entitled
61 "The United States of America versus William Henry Jessup, Jabez Howes, Robert Henry Elam, and Edward Kallerain Howes," and numbered 1756 in said circuit court:

Now, therefore, the condition of this obligation is such that if the above-named William Henry Jessup, Jabez Howes, Robert Henry Elam, and Edward Kallerain Howes, plaintiffs in error, shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

MILLEN GRIFFITH. [SEAL.]
DANIEL TAYLOR. [SEAL.]
THEODORE H. ALLEN. [SEAL.]
JOHN H. COOMBS. [SEAL.]

Signed, sealed, and delivered in presence of—
JOS. F. O'BEIRNE.

UNITED STATES OF AMERICA,
District of California, ss:

Millen Griffith, being duly sworn, deposes and says that he is
62 a freeholder in said district, and is worth the sum of twelve thousand dollars in lawful money of the United States of America, exclusive of property exempt from execution and over and above all his just debts and liabilities.

MILLEN GRIFFITH.

Subscribed and sworn to before me this 18th day of August, A. D. 1879.

JOS. F. O'BEIRNE,
Commissioner of U. S. Circuit Court, Cal.

UNITED STATES OF AMERICA,
District of California, ss:

Daniel Taylor, being duly sworn, deposes and says that he is a freeholder in said district, and is worth the sum of four thousand dollars in lawful money of the United States of America, exclusive of
63 property exempt from execution and over and above all his just debts and liabilities.

DANIEL TAYLOR.

Subscribed and sworn to before me this 18th day of August, A. D. 1879.

JOS. F. O'BEIRNE,
Comm'r of U. S. Circuit Court, Cal.

UNITED STATES OF AMERICA,
District of California, ss:

Theodore H. Allen, being duly sworn, deposes and says that he is a freeholder in said district, and is worth the sum of four thousand dollars in lawful money of the United States of America, exclusive of property exempt from execution and over and above all his just debts and liabilities.

THEODORE H. ALLEN.

Subscribed and sworn to before this 18th day of August, A. D. 1879.

JOS. F. O'BEIRNE,
Comm'r of U. S. Circuit Court, Cal.

64 DISTRICT OF CALIFORNIA, *ss:*

John H. Coombs, being duly sworn, deposes and says that he is a householder in said district, and is worth the sum of four thousand dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

JOHN H. COOMBS.

Subscribed and sworn to before me this 18th day of August, A. D. 1879.

JOS. F. O'BEIRNE,
Commissioner of U. S. Circuit Court, District of California.

(Endorsed:)
The form of the within bond and the sufficiency of the sureties thereon are hereby approved.

(Signed) LORENZO SAWYER,
U. S. Circuit Judge, Ninth Circuit.

Filed August 18th, 1879. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y cl'k.

65 I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing sixty-four written pages, numbered from 1 to 64, inclusive, are a full, true, and correct copy of the record and of all proceedings in the therein-entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court, this 6th day of September, A. D. 1879.

[SEAL.] L. S. B. SAWYER, *Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit, in and for the district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said circuit court, before you, between William Henry Jessup, Jabez Howes, Robert Henry Elam, and Edward Kallerain Howes, plaintiffs in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of August, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th.

The above writ of error is hereby allowed.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

Attest, &c.: L. S. B. SAWYER,
Clerk of U. S. Circuit Court Cal.,
P'r J. F. O'BEIRNE, *D'p'y Cl'k.*

67 The answer of the judges of the circuit court of the United States for the district of California.

The record and proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within men-

FILED
APR 17 1902
JAMES H. McKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES.

No. 303.

WILLIAM HENRY JESSUP, ET AL.

Plaintiffs in Error.

vs.

THE UNITED STATES,

Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

W. W. MORROW,

Counsel for Plaintiffs in Error.

Supreme Court of the United States

W. H. JESSUP, ET AL.,
Plaintiffs in Error.

vs.

THE UNITED STATES.

Brief for Plaintiffs in Error.

STATEMENT OF THE CASE.

The facts of this case are briefly as follows: Section 161 of the "Act to provide Internal Revenue to support the Government, to pay Interest on the Public Debt, and for other Purposes," approved June 30th, 1864 (13 Statutes at Large, pp. 294, 295), provides as follows: "That the COMMISSIONER OF INTERNAL REVENUE may, from time to time, furnish, supply, and deliver to any manufacturer of friction or other matches, cigar lights, or wax tapers, a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without pre-payment therefor, ON A CREDIT NOT EXCEEDING SIXTY DAYS, requiring in advance such security as he may judge necessary to secure payment therefor to the TREASURER OF THE UNITED STATES within the time prescribed for such payment. And upon all bonds or other securities taken by said Commissioner, under the provisions of this Act, SUITS MAY BE MAINTAINED BY SAID TREASURER in the Circuit or District Court of the United States, in the several districts, where any persons giving said bonds or other securities reside or may be found, in any appropriate form of action."

The above provision of law being in force, and W. H. Jessup, a manufacturer of friction matches, in San Francisco, Cal., desiring to avail himself of the privilege it afforded of obtaining internal revenue stamps on a credit of sixty days, gave a bond to the United States dated November 3d, 1869, in the penal sum of ten thousand dollars, with the said Jessup, as principal, and Jabez Howes, Robert Henry Elam and Edward Kallerain Howes, as sureties. (Transcript of Record, pp. 5 and 6.)

On the 18th day of December, 1869, the Assistant Treasurer at San Francisco supplied Jessup with stamps, to the amount of $3,000, on a credit of sixty days. (Transcript of Record, p. 12.)

Payment was due for this purchase February 18, 1870, and was duly made at that date.

The account of the Assistant Treasurer, on page 12 of the Transcript of Record, shows that a payment of $3,000 was made on the day of the above named purchase, to wit, December 18th, 1869; but such payment was not, in fact, made until February 18th, 1870, when the book-keeper entered the credit as of the date of purchase. The same course was also pursued with all the other credits, down to the credit of $4,000, on April 18th, 1870.

In the testimony of Edward St. John Bellows (Transcript of Record, p. 15) he states the true facts respecting these credits. He says: "The credit of sixty days was given to the match manufacturers, down to April 18th, 1870."

The Assistant Treasurer continued to supply stamps to Jessup, from time to time, extending over a period of six years.

From December 18th, 1869, to April 18th, 1870—a period of four months, or one hundred and twenty days—the credits were for a period of exactly sixty days; but on the last named date, the Assistant Treasurer made a contract with Jessup, without the knowledge or consent of the sureties on the bond, whereby Jessup was given a standing credit, by the Assistant Treasurer, of stamps to the value of $8,000; and from the said 18th day of April, 1870, down to the end of the account, January 1st, 1876, a period of five years, eight months and a half, the period of credit was wholly ignored.

At the close of the account, the standing credit of $8,000 remained unpaid; and, under the agreement between the Assistant Treasurer and Jessup, whereby all payments were always applied to the oldest debits, the indebtedness of $8,000

was for advances made in September, October, November and December, 1875.

In April, 1877, the United States brought suit, in the United States Circuit Court for the District of California, against Jessup and the sureties on the bond, dated November 3d, 1869, to recover the said balance of $8,000. The case was tried in June, 1879, and judgment awarded in favor of the defendant in error.

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign the following errors of the Circuit Court, upon which they rely for a reversal of the judgment in this case, that is to say :

I.

The Court erred in not granting defendants' motion to dismiss the action :

1st. Because the bond set forth in the complaint, and on which the action was brought, is given to the United States, and not to the *Treasurer of the United States*, as required in Section 161 of the Act of June 30, 1864, as amended (13 Statutes at Large, p. 295 ; Transcript of Record, pp. 5, 6 and 11, folios 18–22 and 43.)

2d. Because the suit was brought by and in the name of the United States as plaintiff, instead of by and in the name of the *Treasurer* of the United States as plaintiff, as required by Section 161 of the Act of June 30, 1864, as amended. (13 Statutes at Large, p. 295 ; Transcript of Record, pp. 2–4, and 11, folios 6–16, and 43.)

II.

The Court erred in admitting in evidence the bond dated November 3d, 1869.

Because said bond recited as one of its conditions (Transcript of Record, p. 5, folio 19,) that it was pursuant to Section 161 of the Act of June 30th, 1864, (13 Statutes at Large, p. 295.) While it appeared on its face that it was not in accordance with the requirements of said section. Said bond having been given to the United States as obligee, whereas the Statute required that said bond should be given to the

Treasurer of the United States as obligee. (Transcript of Record, p. 11, folio 44.)

III.

The Court erred in admitting in evidence the account of the *Assistant Treasurer* at San Francisco, with W. H. Jessup, (Transcript of Record, pp. 12–15, folios 47–53.)

1st.—Because the suit being between the United States as plaintiff, and the said W. H. Jessup and the sureties on his official bond as defendant, said account showing stamps supplied by the Assisstant Treasurer at San Francisco was irrelevant and immaterial.

2d.—Because it did not appear, nor was there any evidence tending to show that the United States or the Commissioner of Internal Revenue supplied any portion of the stamps mentioned in said account.

3d.—Because, assuming that said bond dated November 3d, 1869, was intended as security for stamps to be supplied by the Assistant Trearurer at San Francisco, instead of for stamps to be supplied by the United States or the Commissioner of Internal Revenue, yet the bond not being a continuing guaranty, it was in any event exhausted as a security by the first credit of sixty days, and as said account did not purport to show any default in the payment of said first credit of sixty day, it was irrelevant and immaterial to show any later or other default.

4th.—Because assuming that said bond was intended as security for stamps to be supplied by the Assistant Treasurer at San Francisco instead of for stamps to be supplied by the United States or the Commissioner of Internal Revenue, yet it appearing on the face of said account that the credits given by the said Assistant Treasurer of the United States were continuously for irregular and greater periods than sixty days, said account was not within the requirements of the Statute, the conditions of the bond or the terms of the contract of the sureties, and therefore irrelevant and immaterial.

IV.

The Court erred in rendering judgment for the United States, plaintiff in the Court below, because the facts as shown

by the record and Bill of Exceptions are not sufficient to support the judgment, for the following reasons:

1st. The evidence fails to show that the Commissioner of Internal Revenue furnished, supplied or delivered, to the said Jessup, a suitable or any quantity of adhesive or other stamps without pre-payment therefor.

2d. Assuming that the Assistant Treasurer of the United States, at San Francisco, supplied Jessup with stamps, on the faith and security of the bond in suit, yet as said bond was not a continuing guaranty, it was only security for one credit of sixty days, and the evidence shows that there was no default in the payment of any credits except the last four in 1875, the one hundred and sixteen previous credits, covering a period of over five years and eight months, and aggregating $165,000, were fully paid, (Transcript of Record, pp 12–16, folios 47–57).

3d. Assuming that the Assistant Treasurer, at San Francisco, supplied Jessup with stamps, on the faith and security of the bond in suit, and that said bond was a continuing guaranty, it was in any event, only security for stamps supplied on credit, *not exceeding sixty days*, as provided in the bond, and required by Section 161 of the Act of June 30, 1864. The account shows that the credits were continuously for irregular and greater periods than sixty days, and there is no evidence to show a default in payment for stamps supplied in accordance with the terms of the bond and the requirement of the Statute.

4th. Assuming that the Assistant Treasurer of the United States, at San Francisco, commenced to supply Jessup with stamps, on the faith and security of the bond in suit, on the 18th of December, 1869, and that said bond was a continuing guaranty, it was only security for stamps supplied on a credit in accordance with the terms of said bond and the provisions of the Statute, and was not security for stamps supplied in accordance with the terms of a private agreement entered into between the said Assistant Treasurer and the said Jessup, without the knowledge or consent of the sureties on said bond. The evidence shows that on the 18th day of April, 1870, the said Assistant Treasurer made a new contract with the said Jessup whereby the latter was given a standing credit by the Assistant Treasurer, of stamps to the value of $8,000, and that from the said 16th day of April, 1870, down to the end of the account, to wit: January 1, 1876, a period of five

years, eight months, and over, the period of creditt of sixty days, was wholly disregarded, that this new contract was made without the knowledge or consent of the sureties on the bond, from which it follows that the sureties, the plaintiffs in error, were not bound in any event for stamps supplied under the new contract. (Transcript of Record, pp. 12 and 15, folios 47 and 54.

POINT I.

The security provided by Section 161, of the Act of June 30, 1864, (13 Statutes at Large, p. 295) for stamps supplied to a manufacturer of friction matches, on a credit not exceeding sixty days, was such security as the Commissioner of Internal Revenue might judge necessary "to secure payment therefor to the *Treasurer of the United States.*" It was also such security as the said *Treasurer* might maintain a suit upon in the Circuit or District Courts of the United States, in any district where any of the persons giving the security might be found in any appropriate form of action.

The bond set forth in the complaint and upon which the action rested was not such security. It does not conform to the requirements of the statute in important particulars. In reciting the conditions of the obligation, the bond attempts to set forth preliminarily the provisions of Section 161 of the Act of June 30th, 1864, and avers that the section authorizes the Commissioner of Internal Revenue to furnish stamps on a credit not exceeding sixty days, requiring in advance such security as he may judge necessary to secure payment therefor to the *Treasury* of the United States, that is to say, to secure payment to that particular department of the Government, the head of which is the Secretary of the Treasury (Sec. 233 U. S. Revised Statutes). But such is not the provision of the section in question. The security authorized by the statute is to secure payment to the *Treasurer* of the United States, an officer of the Government having charge of its moneys, etc. (Sec. 305 U. S. Revised Statutes.)

It may be said that this objection is more critical than substantial, but when we find that it is further provided that "upon all bonds or other securities taken etc., suits may be maintained by said *Treasurer*," we discover that the bond set forth in the complaint differs very materially and substantially from the bond or security required by the statute. It is not a bond

upon which the *Treasurer* of the United States can or does maintain an action.

POINT II.

But it may be urged that the security which the Commissioner of Internal Revenue was authorized to require, was simply to secure payment to the *Treasurer* of the United States, for the stamps supplied on a credit, and need not run to him as an obligee. Admitting this to be so, still the statute has authorized the Treasurer *only* to maintain suit on such security "And upon all bonds or other securities taken by said Commissioners, under the provisions of this Act suits may be maintained by said *Treasurer* in the Circuit or District Court of the United States," etc. (Sec. 161, Act of 1864.)

"In all cases of contract with the United States, they must have a right to enforce the performance of such contract, or to recover damages for their violation, by actions in their own names, *unless a different mode of suit be prescribed by law.*"

Dugan vs. *United States*, 3 Wheaton, 172.

"In all suits where the United States are the real plaintiffs the proceedings should be in their name *unless it is otherwise ordered by Act of Congress.*"

Benton vs. *Woolsey*, 12 Peters, 27.

"In all cases of contract with the United States an action may be brought in their name, *unless a different mode of bringing it be prescribed by law.*"

United States vs. *Jacob Barker*, 1 Paine, C. C., 160.

"Congress may, if it choose, make provision for such suits to be brought in the name of a public officer. Thus it is enacted that all suits for the recovery of debts or balances due the General Post-Office, shall be instituted in the name of the Postmaster-General of the United States (IV Stat. at Large, p. 112)."

VII Opinion of the Att'y-Gen'l., p. 50.

In this case while the Treasurer of the United States only is authorized to maintain a suit under the statute in question, he is not mentioned as plaintiff, nor does it appear in any way that he has authorized the suit to be maintained, or even claims a deficiency upon which a suit could be based. Surely

such a plain provision of the statute can not be disregarded, and on the averments of the complaint the suit should have been dismissed.

POINT III.

The argument made under the two preceding points will apply with equal force to the question of the relevancy of the bond, mentioned in the complaint, to any issues that might arise in a suit properly brought under Section 161 of the Act of 1864.

It can not be said that it was good as a voluntary bond, because its express and main conditions were based upon the statute mentioned in the bond, and set forth in the complaint. (Transcript of Record, p. 2, folio 7.

The bond depends for its validity upon the statute; and since it is not in accordance with its terms, there is a fatal variance, and the bond inadmissible in evidence.

POINT IV.

From the record, it appears that the account upon which the suit was brought against the sureties was one for stamps supplied by the *Assistant Treasurer* at San Francisco.

There is no evidence nor claim that the liability was incurred through deliveries from the Commissioner of Internal Revenue.

The question presented is, therefore: Was the account for stamps delivered by the Assistant Treasurer at San Francisco admissible and relevant in a suit upon a bond of this character, given in pursuance of 161st Section of the Act of June 30th, 1864. (U. S. Revised Statutes, Sec. 3425.)

The language of that Act provides that the "Commissioner may, from time to time, deliver to any manufacturer of friction or other matches * * * *on a credit* not exceeding sixty days, requiring in advance such security," etc.

The security here referred to is the bond in suit, for it recites by words, its execution in pursuance of the provisions of this Act.

Therefor, it was given for, and accepted as, security for stamps supplied by the Commissioner of Internal Revenue.

But there is an endeavor in this suit to have the bond subserve another purpose, namely, as security for sales on credit, by the Assistant Treasurer.

The character of the sales by an Assistant Treasurer is very different from those by the Commissioner.

Sec. 3427 of the Revised Statutes provides that the Commissioner is authorized to supply to Assistant Treasurers suitable quantities of stamps. The Commissioner is further empowered to require from such Assistant Treasurers a bond, "conditioned for the faithful return of all quantities or amounts "*undisposed of, and for the payment, monthly,* of all quantities "or amounts sold or not remaining on hand."

Sec. 170 of the act of June 30 1864 13 Stats at Large 247 8

On all sales the Assistant Treasurer is entitled to receive a commission. It will be seen, therefore, that the Assistant Treasurer is clearly empowered to sell for cash only, and not on a credit; for he is required to deliver a bond for the *payment, monthly,* of all quantities of stamps delivered to him.

The Assistant Treasurer is not here authorized to sell stamps on a credit. If he were empowered to do so, he would not be required to give a bond for the *payment, monthly,* of all stamps furnished him. By the express terms of this Section under consideration, he must, at the end of each month, report to the Commissioner, the amount of stamps undisposed of, and forward the money in payment for the difference.

The Assistant Treasurer is personally responsible for the stamps delivered to his care, and indeed this is not an onerous liability, because it does not devolve upon him any other duty than to effect cash sales.

The sales upon credit are left wholly to the Commissioner of the Internal Revenue, and should any loss to the Government be sustained by a defalcation on the part of the purchaser and the insolvency of his bondsmen, the United States alone must sustain the loss.

In this case, however, it seems that the Assistant Treasurer has supplied a manufacturer of matches with stamps *on a credit.*

But it furthermore appears that a bond conditioned for payment of the stamps so delivered has been executed by the manufacturer of matches, William H. Jessup.

If the Assistant Treasurer, in his official capacity, delivered stamps on the faith of this bond, it was purely a private and personal matter between himself and Jessup.

He is responsible to the United States on his own individual bond, and then in turn he might retrieve his loss by recourse to ~~the~~ bond in suit.# Such an action is different,

Given to him unofficially by the match manufacturer if such a bond had been exacted.

however, from the present one. The case at bar is a statutory action upon a statutory bond; the action if brought by the Assistant Treasurer, would be a common law action upon an ordinary bond of indemnity.

The account introduced in evidence, and to which ruling of the Court upon its introduction an exception was reserved, purports to be a system of credits and debits for stamps supplied by the Assistant Treasurer, and it is the account as kept in his office.

But the sureties only became liable for stamps furnished by the *Commissioner of Internal Revenue* on a credit not exceeding sixty days, and in pursuance of the provisions of Sec. 3425, U. S. Revised Statutes.

They did not bind themselves, or guarantee payment for stamps delivered by the Assistant Treasurer, any more than for deliveries by any other person having Internal Revenue stamps in his custody and control.

It will be seen, therefore, that the distinction between purchases from, and sales by, the Commissioner of Internal Revenue and those by Assistant Treasurers, is marked. It does not appear that the accounts were kept by the Assistant Treasurer as agent or on behalf of the Commissioner, but only as and for sales of stamps made by the Assistant Treasurer, ostensibly in pursuance of the provisions of Section 3427 of the Revised Statutes. See 170 of the act of June 30 1864

Since the bond was conditioned for the payment of stamps delivered by the Commissioner of Internal Revenue, the account for deliveries by the Assistant Treasurer was inadmissible to prove a liability within the purview of the bond.

The ruling of the court was erroneous.

POINT V.

The operation of the bond extends to but one credit of sixty days.

It will be observed that the language of the Statute and bond is expressed in the singular number:

"The Commissioner * * * may from time to time, "supply and deliver, to any manufacturer of friction or "other matches * * * *a suitable quantity* of adhesive "or other stamps * * *without prepayment* therefor, on a "credit not exceeding sixty days, requiring in advance such "*security* as he may judge necessary to secure *payment* there-

" for, to the Treasurer of the United States, within the time " prescribed for *such payment*."

The Statute and the bond seem to have regard to a single transaction.

" If the plain terms of the contract may be fulfilled by be- " ing confined to one transaction, courts are not anxious to " extend it to others."

Baker vs. *Rand*, 13 Barb., 152.

The Bond is a non-continuing guaranty, and the sureties are not liable for a delivery of, and a non-payment for, stamps in excess of the penalty, $10,000.

The sureties are bound to the United States for a credit to Jessup, not exceeding $10,000. When, therefore, stamps had been delivered to the value of the penalty, the object of the bond was accomplished.

A copy of the bond appears on the record, page 5, and its language need not be set forth here. It does not appear, however, from an inspection of the instrument itself, what was the intent of the sureties in its execution, whether it contemplated a continuing credit, or a single one of $10,000. It merely recites that the sureties are bound in a specified sum, for the delivery of stamps to their principal.

Under these circumstances it follows that the presumption of law is that the guaranty is a non-continuing one.

" In doubtful cases the presumption should be against the " construction that the guaranty is continuing."

Cremer vs. *Higginson*, 1 Mason, 323.

" A guaranty will not be construed as a continuing one, " unless its language clearly indicates that such was the inten- " tion of the parties."

Sandford vs. *Dick*, 15 Conn., 457.

" The tendency of decision in this country has been against " construing guaranties as continuing, unless the intention of " the parties is so clearly manifested as not to admit of a " reasonable doubt."

Baylies on Sureties and Guaranties, p. 7.

And cases cited.

Therefore, the fact that the bond can be construed as a continuing guaranty, will not aid the defendant in error. It must affirmatively appear not to have been the intention of the sureties to have the instrument otherwise construed.

A few instances will better illustrate the application of the principle in decided cases.

Twenty-seven persons signed a guaranty, by which they agreed to be, each, bond for one hundred dollars for the purchasers, "for any goods" they might buy of the sellers, "and each of us to be bound for one hundred dollars and no more."

Held: this was not a continuing guaranty, and only bound the guarantors for goods sold at any time or times, which, in the whole, amounted to twenty-seven hundred dollars.

Wilde vs. *Haycraft*, 2 Duvall, (Ky.) 309.

The following obligation was held not to be a continuing guaranty:

"I hereby agree to be answerable for the payment of 50l. "for T. Lerigo, in case T. Lerigo does not pay for the gin, "etc., which he receives from you, and I will pay the "amount."

Nicholson vs. *Paget*, 1 Cromp & Mees, 164.

The material portion of a writing was:

"We offer ourselves in security to any getleman who may "feel disposed to give him (purchaser) credit, not exceeding "seven hundred dollars, to be bound and held firmly by this "writing to pay the said sum of seven hundred dollars, or any "less sum." Held: This was not continuing, and only authorized the giving of credit one time.

Aldricks vs. *Higgins*, 16 Serg. & Rawle, 212.

"In *Kirby* vs. *The Duke of Marlborough*, 2 Maul & Sel, 18, it was held that a bond entered into by A. and B. to the plaintiffs, to enable A. to carry on his trade, conditioned for the payment of all such sums not exceeding 3000*l*, which should not at any time thereafter be advanced by plaintiffs to A., is not a continuing guaranty to the extent of 3000*l*, for advances made at any time, but only a guaranty for advances once made to the extent of 3000*l*."

De Colyar on Guaranties, 282.

Since it appears from the evidence that the amount of the bond, $10,000 was furnished in stamps to Jessup, and that the indebtedness therefor was liquidated by him, it follows that all subsequent deliveries of stamps are not chargeable against the sureties, their guaranty being a non-continuing one.

POINT VI.

It will be seen by an inspection of the copy of the bond set forth in the record, that the period of time for which it contemplates a credit, is sixty days ; and security therefor is provided.

The terms of the statute recognize the utility of a limited credit to purchasers of stamps, and sixty days' time allowed for payment.

It was under these circumstances, and in view of this credit, that the bond was executed, and to accomplish this object—the allowance of a credit of sixty days—was the intent of the sureties. A limited credit meant a limited liability, as compared with a more extended credit. This was the recital of the bond, and a deviation from the terms of their contract, which, in this case, by an agreement for a greater term of credit, confessedly increased their liability, would operate to discharge them.

From the Record, pages 15 and 16, folios 54–57, it appears that a different arrangement was entered into by and between the Assistant Treasurer at San Francisco and W. H. Jessup, the manufacturer of matches, and the principal on the bond. The period of time allowed for credit was extended from sixty days to an indefinite period, and in lieu of *time*—which heretofore had been the essence of the contract on the part of the sureties—was substituted the *amount* for which credit was given. The sureties made themselves responsible for a delivery of stamps, on a credit not exceeding sixty days, while here they were delivered on unlimited credit, provided the aggregate indebtedness due upon the sales did not exceed $8,000.

The general rule of law relative to the discharge of the sureties is concisely stated in the following :

"A surety, when sued upon his contract, may plead as a defense that since the execution of his contract, the creditor, with full knowledge of the existence of the suretyship, has, for a good consideration, without the consent of the surety, entered into a binding contract with the principal, extending the time of payment of the debt for a definite time ; and unless it appears that the surety has been indemnified by the principal debtor, or that the creditor, in extending the time of payment, reserve his remedies against the surety, the defense is perfect."

Baylies on Sureties and Guarantees, 412, and cases cited.

Pomeroy vs. *Turner*, 70 N. Y., 547,

"The rule of law is, that if a creditor, without the knowledge and consent of the surety, expressly or tacitly yielded, give time to the principal by enlarging the credit beyond the period mentioned in the contract, the surety is discharged, both in equity and at law. The reason is an obvious one."

The United States vs. *Hillegas*, 3 Wash. C. C., 75

The question arises in this case; was the extension of credit entered into on the part of the Assistant-Treasurer and Wm. H. Jessup, a binding agreement, and was it of such a character as would bring it within the purview of the law, as laid down and operate to discharge the sureties.

The stamps were delivered by the Assistant Treasurer, and the sales were effected by him. He was the vendor. It was competent for him to make a sale upon whatever terms he saw fit, and there was nothing that prevented him from selling upon a credit, acting either in his own behalf or as agent for the United States. The United States stands in no better or different position from any private person. It contracts through its agents.

As was said by the Court in the *United States* vs. *Hillegas*, 3 Wash. C. C., 74:

"The United States are a collective indivisible body, which can act, and can be seen only in the acts of those who administer the affair of the government, and their agents duly appointed and empowered to act for them. The supervisor or manager of the Internal Revenue in relation to the collection, agreed to give Nichols six, twelve and fifteen months' indulgence for paying for what was at the time due to the United States, in consideration of receiving from him certain securities. The Commissioner of Revenue under whose supervision this officer was, approved of the measure and the Secretary of the Treasury, with full knowledge of all that had been done, if he did not expressly approve, he evinced no disapprobation at what the supervisor had done, and certainly did not attempt to control him.

After all these acts of the officers of the government, all acting within their proper spheres, it is too much to deny that they are to be imputed to the United States, and to be considered as the acts of the United States." The sureties were accordingly held to be discharged.

There is no pretense that the ~~Department~~ assistant treasurer exceeded ~~its~~ his authority, or that the contract was *ultra vires*. These acts

were consequently valid. The extension of credit and the manner of keeping the accounts were, therefore, binding. The extension and method were based upon a valid consideration, too. The period of credit was a part of the sales of the stamps. It was an inducement to purchase. The delivery of the stamps and the deferred liability on the part of the purchaser to pay therefor, were concurrent. The stamps were supplied upon an agreement and understanding that payment was not to be demanded or incurred as a liability in law until a future period, beyond sixty days, and as long as the amount of indebtedness should not exceed the sum of $8,000. It will be observed that the period was therefore certain. It will be observed that it is not a fact that the sales were made on the sixty day credit, and that after the delivery the ~~United States~~ Assistant Treasurer simply forbore to demand payment for a longer period. But it appears that at the time of delivery it was understood that the credit should be for a period in excess of sixty days. The credit was a part of the sale; it was together with the delivery of the stamps, the consideration which the ~~government~~ Assistant Treasurer gave and the inducement ~~they~~ he offered. The acceptance of the stamps on this condition completed the contract. Sales of this character are not distinguishable from the ordinary binding sales upon credit in business and mercantile life.

The ~~United States~~ Assistant Treasurer acted on this arrangement; ~~they~~ he ratified it by ~~their~~ his acquiescence. ~~They~~ He fulfilled ~~their~~ his part of the contract, and the Assistant Treasurer testifies that he "notified the defendant Jessup, from time to time, that the *amount of the bond* was due and have called upon him for payment." (Record, p. 16, folio 56.)

Jessup, however, failed to perform his part of the agreement and an attempt is here made to hold the sureties liable for these acts of their principal.

The extension however discharged the sureties. It was an extension for a definite period, because it could be rendered certain by an indebtedness equaling the penalty.

"The agreement by a creditor to give time to the princi-
"pal, need not be in express words, in order to discharge the
"surety. It is sufficient, in that regard, if a mutual under-
"standing and intention to that effect are proved. If the
"parties act upon the terms of an implied agreement to that
"effect, it will be sufficient."

Brandt on Suretyship, § 304, and cases cited.

But this principle is embodied in the general rule as laid down by the Court in *United States* vs. *Cheeseman*, 3 Sawyer, 429.

"The liabilities of sureties cannot be extended by implica-
"tion or construction. The surety cannot be bound beyond
"the scope of his engagement. He is entitled to stand upon
"the strict terms of his contract. His liability is *strictissimi*
"*juris* and cannot be extended beyond the reasonably neces-
"sary import of the language of the bond."

The following statement of the account of W. H. Jessup with the Assistant Treasurer (Transcript of Record, pp. 12–15, folios 47–53) shows the change of system effected by the new contract made between the Assistant Treasurer and Jessup, on the 18th day of April, 1870.

1869.				1869.			
Dec. 18.	Stamps delivered		$3,000	Dec. 18.	Cash		$3,000
1870.				1870.			
Jan'y 15.	Stamps delivered		1,000	Jan'y 15,	Cash		1,000
Feb'y 5.	"	"	1,000	Feb'y 5.	"		1,000
Feb'y 12.	"	"	2,000	Feb'y 12.	"		2,000
Feb'y 19.	"	"	1,000	Feb'y 19.	"		1,000
Feb'y 19.	"	"	100	Feb'y 19.	Commissions on $2,000		100
March 5.	"	"	2,050	April 16.	Cash		1,000
March 12.	"	"	1,000	April 16.	Commissions on $1,000		50
March 26.	"	"	1,050	April 18.	Cash		4,000
March 31.	"	"	1,500	April 18.	Commissions		200
April 16.	"	"	50	May 3.	Commissions		25
April 18.	"	"	8,100	May 7.	Cash		500
May 7.	"	"	25				
	Total to date		$21,875		Total to date		$13,875
					Bal. due Asst. Treasurer		8,000
							$21,875

The dates of credits of cash and commissions, as shown above, down to April 18th, are not in fact true. The stamps were sold on a credit of sixty days, and the payments were made at the expiration of that time, but entered in the account as paid on the day of sale.

Edward St. John Bellows, the book-keeper in the office of the Assistant Treasurer, says:

"The credit of sixty days was given to the match manufac-
turers down to April 18th, 1870. We then brought down a
standing credit of the amount they were allowed to draw on
the bond, which, in this case, was a credit of $8,000."

(Transcript of Record, p. 15, folio 54.)

The account shows a total credit of $8,500 on the 18th of

April; that is to say, the amount then due the Assistant Treasurer was $8,500, or an excess of $500 over the amount allowed to be drawn on the bond; but, as the last named amount was paid May 7th, reducing the balance to $8,000, at which sum the credit was continued, it will not be considered as affecting the question at issue in this case.

The material point is, that Jessup was, on the 18th day of April, 1870, supplied with stamps to the full amount of the bond, without regard to the time of payment.

Mr. Bellows says: "From April 18th, 1870, on, we required the match manufacturer simply to keep the amount of the bond good, and the practice was when the manufacturer drew any amount of stamps from the office he paid an equal amount on the oldest debit, without regard to the length of time the debt had been running." (Transcript of Record, p. 15, folio 54.)

Now, if we turn to the account, we find this statement supported by the entries subsequent to April 18th. Passing by the entry, on the credit side of the account of "May 7th, Cash $500,' for the reason that payment was merely for the purpose of reducing the account to $8,000, as before explained. We find the next entry on the same side of the account, May 30, Cash $1,000, and on the debit side of the account, May 31st, stamps delivered $1,000, and so on through the whole account. An entry of cash and commissions on the credit side of the account, and on the same day, or soon after, a debit of a corresponding amount for stamps delivered. By this system the only condition imposed on the match macufacturer was that he could not draw stamps to an amount exceeding $8,000. The time of credit was wholly ignored, as will be seen by examining the account for that purpose.

Take the debit of $8,100 of April 18th; now, if we examine the credit side of the account, we find the cash entries do not reach that amount until September 19th, or one hundred and fifty-three days from the day the stamps were supplied. The next time stamps were supplied was May 31st, which were paid for, September 24th, or nearly four months after they were furnisned, and so on through the whole account, a comparative examination showing that no stamps were ever paid for within the sixty days. But the most remarkable part of the account is that portion which relates to 1874. On the 31st day of January, 1874, there was due the Assistant Treasurer $8,000. No payment was made on this indebtedness until

the following June. No stamps were delivered during this time, and the business must therefore have been suspended; but notwithstanding this long delay, the Assistant Treasurer takes up this overdue account in June, 1874, and continues to supply stamps on it for another year and a half.

This is not a case of mere forbearance, it is a complete and absolute change of the terms of the bond, and contrary to the provisions of the Statute.

W. H. Jessup, the match manufacturer, in his testimony says, "that his sureties knew nothing of the change of the system of credits adopted by the Assistant Treasurer of the United States, on the 18th day of April, 1870, and it was thereupon admitted that the sureties on the bond in suit knew nothing of any change in the matter of credits and debits."

(Transcript of Record, p. 16, folio 57.)

The sureties on the bond were to guarantee payment for stamps delivered to Jessup on a "credit not exceeding sixty days." After the 18th day of April, 1870, no stamps were delivered to Jessup on a credit of sixty days, and therefore no breach of the terms of the bond has been shown.

The requirement of the statute that stamps should be supplied on a credit not exceeding sixty days, was to comply with the business custom of the country, and by giving the usual credit for sixty days, enable match manufacturers to pay for their stamps at periods corresponding with their collections, but when the Assistant Treasurer ignored the law and custom, he did away with the whole intent and purpose of the Statute, and violated the terms of the contract with the sureties, while enlarging the scope of their liability.

I respectfully submit that the judgment of the Circuit Court should be reversed.

WM. W. MORROW,
Attorney for Pltfs. in Error.

16-147

OFFICE SUPREME COURT U.S.
FILED
OCT 6 1882
ALEXR. C. MCKAY, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

WILLIAM HENRY JESSUP ET AL., plaintiffs in error,
v.
THE UNITED STATES.
No. 43.

BRIEF ON THE PART OF THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

WILLIAM HENRY JESSUP ET AL., plaintiffs in error,
v.
THE UNITED STATES.
No. 43.

BRIEF ON THE PART OF THE UNITED STATES.

This is an action on a penal bond executed by W. H. Jessup and others as security to the government for such revenue stamps as might be furnished from time to time to Jessup, a manufacturer of friction matches, on credit, under the second proviso of section 161 of the act of 30th June, 1864.

Upon submission of the whole matter of law and fact to the court, judgment was rendered in favor of the United States for the sum of $8,690.91 and costs.

This judgment is assailed here for error on various grounds.

I. It is contended that the defendants' motion to dismiss the action should have been allowed on the ground

that the bond in question is not in conformity to the statute, because it is payable to the United States instead of the Treasurer of the United States, as the law requires, and because the United States is plaintiff instead of the Treasurer, who is authorized to sue by the statute. Upon the same grounds the admissibility of the bond as evidence was objected to (R., p. 11).

It is true, the statute directs the Commissioner of Internal Revenue to require persons to whom stamps are advanced on credit to secure payment therefor to the Treasurer, and provides that the Treasurer may sue upon any security so taken, but it is submitted that these provisions are directory, merely, and in no wise affect the rights of the plaintiffs in error. The statute *does not prohibit* taking security in the form employed. Its object was to protect the Treasury, and is as effectually attained by a bond payable to the United States as by one payable to the United States Treasurer. Provisions intended for the guidance of officers in the conduct of business are not to be taken as limitations of their power. (French *v.* Edwards, 13 Wall., p. 511; Cooley, Con. Lim., pp. 74–78; Sedgw., Stat. and Con. Law, pp. 368–378.) We submit, therefore, that the bond is in substantial conformity to the statute, in the particulars mentioned, and a good statutory obligation. The cases cited to support the opposite view plainly have no such effect.

II. It is insisted that the account of the assistant treasurer with Jessup should have been rejected as irrelevant to the issue, because there is nothing in the record to connect the assistant treasurer with the United

States or the Commissioner of the Internal Revenue, in short, nothing to show that either the government or the Commissioner furnished the stamps to Jessup.

This is a remarkable position. That William Sherman, from whom Jessup obtained the stamps, was, at the time they were obtained, an assistant treasurer of the United States, and that Jessup dealt with him as such must be regarded as clearly established (R., p. 16).

The stamps furnished must have been supplied, necessarily, to the assistant treasurer by the Commissioner of the Internal Revenue, who is alone authorized to distribute them, and also, by express provision of law, is empowered to use the assistant treasurers of the United States as his agents for that purpose. (*Vide* section 170 act 30th June 30, 1864.) How was it possible, then, for the assistant treasurer in this case to have furnished the stamps to Jessup in any other quality than agent of the Commissioner?

In providing increased facilities for the distribution of stamps, by section 170, Congress had no intention to withhold thereby from the Commissioner the power to furnish stamps on credit to manufacturers of friction matches, under the second proviso of section 161, by means of the assistant treasurers and other officers named in the section first mentioned. Such a construction would manifestly frustrate, to that extent, the purpose of Congress, by actually *diminishing* the facilities for supplying the community with stamps.

But whether this interpretation of section 170 be correct or not, it is not contended, nor could it be, successfully, that this section is so stringent that a bond given to secure payment for stamps furnished on terms differ-

ent from those prescribed would be void as a statutory bond. No precedent for any such view can be found.

It is submitted, therefore, that the account was clearly relevant and admissible.

III. It is contended that by the security for stamps advanced on credit, required by section 161, is meant a new security for each and every advance of stamps, and that the manufacturers needing stamps, from time to time, must give security *toties quoties* they are furnished, and, consequently, that the bond in suit was security only for the first advance of stamps, all subsequent advances having been made entirely without security.

It is difficult to believe that Congress could have intended anything so vexatious and obstructive, and we do not think this reading of the law can be sustained.

It is submitted that the use of the words "from time to time" clearly shows that Congress, forecasting that it would be advisable to furnish manufacturers of matches with stamps as occasions of business demanded, intended the required security to be a permanent basis of credit by which the manufacturer might the more readily meet the constantly recurring necessity for stamps in his business. In no other sense can we accept the words "*may from time to time furnish, supply, and deliver to any manufacturer* * * *." If security was to be given for every lot of stamps furnished, as is the opposite contention, it is by no means likely that Congress would have employed the expression "from time to time," importing, as it does, a series of acts and transactions; on the other hand, there was manifest propriety in the expression, if intended to apply to a series of dealings

or transactions in stamps carried on for an indefinite time on the basis of security given in advance by the manufacturer.

This reading is conclusively established, it is submitted, by the provision in section 161, that the stamps furnished on credit, at any one time, shall be a "*suitable quantity.*" It is not possible that Congress would thus have qualified the power to furnish stamps on credit, if *separate security* was to be given for every lot of stamps supplied; for in such case the supply must always have been commensurate with the demand, if backed with adequate security. But when we interpret the statute to give the manufacturer the right to give a bond, and, on the basis of that bond, to obtain stamps, on credit "from time to time," for an indefinite period, it was proper for Congress to direct that the quantity of stamps furnished at any one time should be "*suitable*" to the amount of security the manufacturer had given. In the reading insisted on by the other side the adjective "suitable" has no value whatever, whereas, in our reading, it has an important significance.

The recital in the bond, that "whereas adhesive stamps have been delivered *or hereafter may be delivered*" to Jessup, and its condition that Jessup should make faithful return, whenever required, for such stamps "as have been or may hereafter be delivered to him," &c., &c. (R., p. 5), show that the instrument was intended by the parties to be a continuing security.

IV. There is a great deal of argument to show that after 18th April, 1870, stamps were furnished Jessup

on a contract for a longer credit than the statute authorized, and that, consequently, the sureties were thereby discharged.

But this contention is entirely without support in the record. Indeed, the learned judge certifies in the bill of exceptions that "*there was no evidence that there was at any time any agreement or promise to give a credit of more than sixty days for any stamps delivered, or of anything to prevent the government from any time properly bringing an action to recover the value of any stamps delivered at the expiration of sixty days after delivery.*" (R., p. 11.)

That there was indulgence to Jessup is undeniable; but there was nothing in it to tie up the hands of government, and prejudice his sureties.

But suppose the assistant treasurer did furnish stamps to Jessup on a longer credit than the law prescribes, did that exonerate his sureties? Can there be a doubt that the law is directory, merely, in this particular? Indeed, this is conceded by the contention on the other side that the alleged sales of stamps to Jessup by the assistant treasurer on longer credits than the statutory one of sixty days were not *ultra vires* as to Jessup. (Brf., pp. 14, 15.) It is inconceivable that a surety in a statutory bond can have a vested right in the *literal reading of the statute, irrespective of its true meaning and intent.*

V. Regardless of the statute, the bond is prefectly good as a voluntary bond. If it was objectionable for non-conformity to the statute, the objection should have been raised before executing it, for it is too late to do so

now, after the defaulting principal has obtained a large amount of public property on the credit derived from the bond. (United States *v.* Hodson, 13 Wall., 395; United States *v.* Bradley, 10 Pet., 357; United States *v.* Tingey, 5 Pet., 115.)

WM. A. MAURY,
Assistant Attorney-General.